

double patenting under 35 U.S.C. Section 101 is whether a claim in the application can be literally infringed without literally infringing a corresponding claim in a patent. Is there an embodiment of the invention that falls within the scope of one claim, but not the other? If there is such an embodiment, then identical subject matter is not defined by both claims and statutory double patenting would not exist. *See* MPEP, at p. 800-20.

Claim 1 stands rejected under 35 U.S.C. Section 101 as claiming the same invention as claims 1-22 of Swedek. The applicant respectfully traverses the rejection because claim 1 of the present invention and claims 1-22 of Swedek do not cover identical subject matter.

Claims 1-11 of Swedek recite a chemical mechanical polishing apparatus. There is at least one embodiment that falls within the scope of claim 1 of the present application but not claims 1-11 of Swedek. For example, FIG. 2 of the present application shows an embodiment that includes a first optical system and a second optical system, both of which are situated at the same polishing station. This embodiment falls within the scope of claim 1 of the present application because claim 1 does not require the optical systems to be situated at different polishing stations. Claims 1-11 of Swedek, however, *do* require the optical systems to be situated at different polishing stations. The embodiment shown in FIG. 2, thus, falls within the scope of claim 1 but not claims 1-11 of Swedek.

Claims 12-22 of Swedek are method claims and, as such, require the performance of their recited steps. There is at least one embodiment that falls within the scope of claim 1 of the present application but not claim 12-22 of Swedek. The apparatus shown in FIG. 2 of the present application is one example of such an embodiment. The apparatus itself does not literally infringe claims 12-22 of Swedek, as no steps are being performed, but does fall within the scope of claim 1 of the present application, which, as an apparatus claim, does not require the performance of any steps.

As established above, there is at least one embodiment that falls within the scope of claim 1 of the present application but not claims 1-22 of Swedek. Consequently, claim 1 of the present application and claims 1-22 of Swedek do not define identical subject matter and statutory double patenting does not exist. For at least this reason, the statutory double patenting

Applicant : Wiswesser, et al.
Serial No. : 09/851,661
Filed : May 8, 2001
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Attorney's Docket No.: 05542-294002 / 2562C1/CMP

rejection is improper, and claim 1 and claims 2-23, which depend from claim 1, should be allowed.

Claim 34 stands rejected under 35 U.S.C. Section 101 as claiming the same invention as claims 1-22 of Swedek. The applicant respectfully traverses the rejection because, for reasons similar to those discussed above, claim 34 of the present invention and claims 1-22 of Swedek do not cover identical subject matters and double patenting does not exist. Accordingly, the statutory double patenting rejection is improper and claim 34 should be allowed.

The applicant respectfully requests that all pending claims be allowed. No fee is believed to be due with the present reply. Please apply, however, any appropriate charges or credits to deposit account 06-1050.

Respectfully submitted,

Date: July 19, 2004



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